79-482

In The

Supreme Court of the United States

October Term, 1978

No. .....

TERRELL DON HUTTO, Director,
Virginia State Department of Corrections,

and

J. D. COX, Superintendent,
Powhatan Correctional Center,

Petitioners,

v.

ROGER TRENTON DAVIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CASES

OTHER AUTHORITIES

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PRELIMINARY STATEMENT

Terrell Don Hutto (in the place of Jack F. Davis), Director of the Virginia State Department of Corrections and J. D. Cox (in the place of R. M. Muncy), Superintendent, Powhatan Correctional Center, pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on June 29, 1979, in the case of *Roger Trenton Davis* v. *Jack F. Davis,* Director, Virginia State Department of Corrections and R. M. Muncy, Superintendent, Powhatan Correctional Center.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc* has not been reported, and is included herein as Appendix A. The panel decision of the Court of Appeals is reported in 585 F.2d 1226, and is included herein as Appendix B. The opinion of the United States District Court is reported in 432 F.Supp. 444.

JURISDICTION

The jurisdiction of this Court to issue the Writ of Certiorari is this case is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 18.2-248. Penalties for manufacture, sale, gift, distribution or possession of a controlled drug.—Except as authorized in The Drug Control Act, chapter 15.1 (§ 54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.

(a) Any person who violates this section with respect to a controlled substance classified in Schedules I, II or III shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; any person, upon a second or subsequent conviction of a violation of this section involving an opiate or synthetic opiate drug, may in the discretion of the court or jury imposing the sentence, be sentenced to confinement in the penitentiary for a term of life imprisonment or for any period not less than five years; provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II other than marijuana only as an accommodation

to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony; and provided further, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana or a controlled substance classified in Schedule III only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 1 misdemeanor.

Provided, further, that if the violation of the provisions of this article consist of the filling by a pharmacist of the prescription of a person authorized under this article to issue the same, which prescription has not been received in writing by the pharmacist prior to the filling thereof, and such written prescription is in fact received by the pharmacist within one week of the time of filling the same, or if such violation consists of a request by such authorized person for the filling by a pharmacist of a prescription which has not been received in writing by the pharmacist and such prescription is, in fact, written at the time of such request and delivered to the pharmacist within one week thereof, either such offense shall constitute a Class 4 misdemeanor.

(b) Any person who violates this section with respect to a controlled substance classified in Schedules IV, V or VI shall be guilty of a Class 1 misdemeanor.

QUESTIONS PRESENTED

I. Should A Federal Court Invalidate A State Prisoner's Sentence Of A Term Of Years When The Sentence Is Within The Statutory Limits Set By State Law?

II. If A Federal Court Has The Authority To Invalidate A State Prisoner's Sentence Of A Term Of Years, What Standard Should The Federal Court Apply?

III. Did The Court Of Appeals Error In Finding That Respondent's Sentence Constituted Cruel And Unusual Punishment?

STATEMENT OF THE CASE

Roger Trenton Davis was indicted for two separate and distinct violations of the Virginia Drug Control Law. After trial by jury Davis was found guilty of selling marijuana for which he was sentenced to a term of imprisonment of twenty (20) years and fined ten thousand ($10,000.00) dollars. He was also convicted of possession of marijuana with intent to distribute for which he was likewise sentenced to a term of imprisonment of twenty (20) years and fined ten thousand ($10,000.00) dollars. Davis appealed his convictions to the Supreme Court of Virginia which denied his petition for writ of error.

The principle evidence against Davis came from the testimony of Danny Ray Eads. Eads, an inmate in the Virginia Correctional system, became concerned with his wife's usage of drugs and its effect upon the welfare of his two-year-old child. Eads approached state officials and offered to assist in the exposure and arrest of those persons supplying drugs to his wife and any illicit drug distributors, including Davis who Eads identified as an active drug dealer in the county where his wife resided.

The Commonwealth accepted Eads' offer of assistance and granted him a furlough from prison for the purpose of apprehending drug traffickers. He was placed under strict surveillance during the investigation, and at times wore a transmitter strapped to his body so that the police could hear and record his conversations with drug dealers.

Eads met Davis, with whom he had become acquainted in jail while Davis was charged with a different drug offense, and told Davis he wished to purchase drugs for himself and for some mutual friends at the prison. Davis advised that he could sell Eads a quarter pound of marijuana for one-hundred ($100.00) dollars. When Eads protested that the price was too high Davis said he could make up a seventy-five ($75.00) dollar bag.

Eads accompanied Davis to his home where Davis removed a portion of marijuana from a large plastic bag, weighed it on a small scale, and gave three (3) ounces of marijuana to Eads in exchange for seventy-four ($74.00) dollars. Davis also gave Eads some drug pills, including L.S.D. and other illicit controlled drugs. During this transaction Davis said he would like to blow up the State Police Headquarters. The conversations between Eads and Davis were transmitted via Eads' hidden transmitter and recorded by the police. These recordings were played for the jury.

The second charge against Davis resulted from a police raid of his residence. In Davis' bedroom the police discovered two sets of scales and other drug paraphernalia. A small plastic bag containing eight grams of marijuana was found in a jacket, and outside of the bedroom window the police found a large plastic bag, similar to the receptacle from which Davis took the marijuana sold to Eads, which contained one-hundred and sixty-eight grams of marijuana. Davis was found hiding in a closet.

After exhausting his state remedies Davis filed a petition for writ of habeas corpus in the United States District Court. The district court granted the writ upon its belief that the sentence was grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. A panel of the Court of Appeals reversed the

district court concluding that the sentences were neither cruel nor unusual. The Court of Appeals reconsidered the issue *en banc* and by a vote of 4 to 3, adopted the district court opinion and affirmed the issuance of the writ of habeas corpus.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this petition raise important issues of federal law which have not previously been settled by this Court. Until the decision of the Fourth Circuit Court of Appeals, neither this Court nor any federal appellant Court has set aside the sentence of a State Court imposing a sentence for a term of years within the State statutory limits, as being cruel and unusual, without invalidating the statute under which the sentence was imposed. This precedent of setting up the federal court as a super State jury is not only without legal precedent or authority, but is fraught with danger.

To start down the road of reviewing the severity of State sentences which fall within the statutory limits, the federal courts will trespass upon the responsibilities of the Legislative Branch, whose duty is to define a crime and ordain its punishment. *United States* v. *Wiltberger,* 18 U.S. (5 Wheat.) (1820). If such a precedent is allowed to stand the federal courts will have usurped the very function which has traditionally been left to the sentencing authority.

The issues presented will not be limited to local application. They will impact nationally, not only in habeas corpus proceedings, but in the direct review of criminal cases, both State and Federal. Heretofore, federal appellant courts have refused to review the severity of a federal sentence on direct appeal if the sentence fell within the statutory limits set by Congress. *United States* v. *Del Piano,* 593 F.2d 539 (3rd Cir. 1979); *United States* v. *Lincoln,* 589 F.2d 379 (8th

Cir. 1979); *Government of Canal Zone* v. *O'Calgan,* 580 F.2d 161 (5th Cir. 1978), *cert. denied,* ... U.S. ..., 99 S.Ct. 589 (1979). Surely, if the federal courts are given authority to examine the severity of sentences of State courts they will be obliged to apply the same rule to federal sentences.

The decision of the Fourth Circuit Court of Appeals brings it into direct conflict with the decisions of other circuits. Other circuit courts of appeals have consistently refused to review the length of a sentence which was within the limits set by the legislative branch. *United States ex rel. Sluder* v. *Brantley,* 454 F.2d 1266 (7th Cir. 1972); *United States* v. *Wilson,* 506 F.2d 521 (9th Cir. 1974); *United States* v. *MacClain,* 501 F.2d 1006 (10th Cir. 1974); *Page* v. *United States,* 462 F.2d 932 (3rd Cir. 1972).

The opinion of the Fourth Circuit Court of Appeals also conflicts with the opinion of the Fifth Circuit in *Rummel* v. *Estelle,* 587 F.2d 651 (5th Cir. 1978). The court in *Rummel* considered whether a prisoner's life sentence under the Texas habitual criminal statute violated the Eighth Amendment because his sentence was grossly disproportionate to his crime. In finding the sentence neither cruel nor unusual, the Fifth Circuit specifically rejected as a part of the appropriate proportionately analysis the test that "seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted." 587 F.2d at 660, 661. This rejected test was utilized by the Fourth Circuit Court of Appeals in arriving at its opinion that the sentence in the present case was cruel and unusual.

This Court has not given any guidance to lower courts in this sensitive area. *Carmona* v. *Ward,* 576 F.2d 405, 408 (2nd Cir. 1978), *cert. denied,* ... U.S. ..., 99 S.Ct. 874 (1979). Unless this Court promptly provides such guidance,

sentences in criminal cases will be continually in jeopardy, and the finality of judgments in criminal cases will be undermined.

I.
FEDERAL COURTS SHOULD NOT INVALIDATE A STATE PRISONER'S SENTENCE OF A TERM OF YEARS WHEN THE SENTENCE IS WITHIN THE STATUTORY LIMITS SET BY STATE LAW.

From the time the Eighth Amendment was adopted a majority of this Court has struck down only two non-capital punishments as cruel and unusual. In those cases, however, elements of cruelty were present. In *Weems* v. *United States,* 217 U.S. 349 (1910), the defendant was sentenced to fifteen years imprisonment, *cardena temporal,* which involved "hard and painful labor" with "a chain at the ankle, hanging from the wrist." *Id.,* at p. 364. In *Robinson* v. *California,* 370 U.S. 660 (1972), this Court held that imprisonment for the status of being a drug addict was cruel and unusual punishment.

History has shown that this Court has never entered the thicket of substituting its judgment of what constitutes an appropriate sentence for the judgment of the sentencing authority. Various circuit courts of appeals have at different times held that they had no power to review any prison sentence within the legislatively created maximum. *Anthony* v. *United States,* 331 F.2d 687 (9th Cir. 1964); *Smith* v. *United States,* 273 F.2d 462 (10th Cir. 1959), *cert. denied,* 363 U.S. 846 (1960); *United States* v. *Sorcey,* 151 F.2d 899 (7th Cir. 1945), *cert. denied,* 327 U.S. 794 (1946).

The reason such drastic interference with sentences has not been authorized seems to be clear. The power of punishment is vested in the legislative, not the judicial branch of government. The legislature not only defines what shall con-

stitute a crime, but also selects the range of punishment. To authorize federal courts to supervise the length of sentences given by state courts will inevitably bring the courts into conflict with legislative judgments. In our system of government it is the legislature, not the judiciary, who is constituted to respond to the will and moral values of the people.

The difficulties in adopting sentence review are all too apparent. The Fourth Circuit based much of its opinion on the fact that only nine ounces of marijuana were involved in the crimes. Whereas the Second Circuit upheld a sentence of six years to life for the sale of three and three eights ounces of cocaine as not constituting cruel and unusual punishment. *Carmona* v. *Ward, supra.* If the forty-year sentence for the sale and possession with intent to sell nine ounces of marijuana is held to be excessive, should not the sentence for the sale of three and three eights ounces of cocaine be considerably less then forty years? Of course, the drugs involved were different, but who is to say that cocaine is more dangerous then marijuana, the legislature or the courts?

If the sale of drugs in the present case had been sixteen ounces rather than nine ounces, would the result have been the same? Would the result have changed if the sale had been of twenty-four ounces, and if so, who is to draw the dividing line and where is it to be drawn?

Should the decision of the Fourth Circuit be upheld, the respondent must be resentenced. What instructions are to be given to the jury other than it cannot sentence the respondent to forty years. If the jury resentences respondent to thirty years, is that to be considered excessive? What if the resentence is twenty-five years, or twenty years, are they excessive? Again, the question arises who is to draw the line and where is it to be drawn.

Assume for purposes of argument, that nine ounces of

marijuana are sold to a ten-year-old, and the jury arrives at a sentence of forty years. Is the sentence to be considered excessive since only nine ounces were involved, or is it proper to take into account the age of the victim? If it is permissible to take into account the age of the victim, would it not also be proper to take into account that in the present case the drugs were sold by Respondent knowing they were to be taken into the Virginia prison system.

An infinite number of variations can arise which must be taken into account in sentencing, and the courts should not usurp the function of the sentencing authority. In effect what the Fourth Circuit has done in this case is to substitute its judgment not only for the judgment of the Virginia Legislature, but also in place of the jury which fixed the sentence and the trial judge who entered judgment. This Court has not allowed itself to be drawn into the position of becoming, "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country." *Powell* v. *Texas,* 392 U.S. 514, 533 (1968). This Court should not now alter that sound judgment.

II.

IF FEDERAL COURTS HAVE THE AUTHORITY TO REVIEW THE SEVERITY OF A SENTENCE OF YEARS THE STANDARDS USED IN *RUMMEL* v. *ESTELLE*, 587 F.2d 651 (5th Cir. 1978), SHOULD BE ADOPTED.

The Fifth Circuit Court of Appeals concluded that as a result of jurisprudental development the Eighth Amendment's cruel and unusual punishment provision proscribes some punishments that are so disproportionate as to have no rational support. 587 F.2d at 655.

The Fifth Circuit adopted three standards for proportionality review of sentences. First, the Court must look at the nature of the offense. In this regard the punishment must be viewed as it occurs in the real world. Additionally, the Court must be at all times mindful that it is the legislature that selects the range of punishments, and it is the Court's duty to uphold the legislature if there is any rational basis for so doing. Second, the Court is to compare the punishment with similar punishment in other jurisdictions, and third, the Court is to examine the punishment available in the same jurisdiction for other offenses.

The Fifth Circuit specifically rejected the test used by the Fourth Circuit that "seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted." This "lack of necessity" test has never commanded a majority in this Court, even in death cases.

It would be impossible to prove that a less severe sentence would deter crime or be as effective as a longer sentence. A state could never show that a sentence of ten years would deter more effectively than a sentence of five years, or that a jail term would deter more effectively than a fine. Empirical date to support such a judgment would not be available. *See Wheeler,* "Toward a Theory of Limited Punishment II. The Eighth Amendment after *Furman* v. George," 25 Stanford L.Rev. 62.

The Fifth Circuit concluded its determination not to adopt the "lack of necessity" test by saying:

> "The legislature in our society selects the punishment scheme and we are justified to strike down the legislature's choice only when the petitioner demonstrates that the legislative choice has no rational basis and is totally and utterly rejected in modern thought. So long as there is room for debate, the choice of the legislature will not be overturned." 587 F.2d at 661.

If this Court should decide that federal courts have the authority to examine the severity of a sentence for a term of years, it should adopt the standards set forth in *Rummel* and reject the "lack of necessity" test which was utilized by the Fourth Circuit.

III.
THE COURT OF APPEALS ERRED IN FINDING RESPONDENT'S SENTENCE TO BE CRUEL AND UNUSUAL.

In finding Respondent's sentence cruel and unusual the Fourth Circuit relied upon the "lack of necessity" test which Petitioner believes to be improper. For this reason alone the decision of the Fourth Circuit should be reversed.

Additionally, upon examining Respondent's sentence in a rational manner there is nothing to support a finding that it is cruel and unusual. The Fourth Circuit has made a basic error in its analysis of Respondent's sentence. The court has failed to consider that Respondent was convicted of two separate and distinct offenses. The court has lumped the two offenses together to arrive at the sentence of forty years for possession and sale of less than nine ounces of marijuana.

The first offense for which Respondent was convicted was the sale of three ounces of marijuana to Danny Rae Eads. The Respondent knew that Eads was an inmate of the Virginia penal system who was on a furlough. The Respondent also knew that Eads intended these drugs to be distributed to inmates in one of Virginia's penal institutions, and with this knowledge also furnished Eads with other drug pills, including L.S.D. For this offense the jury sentenced Respondent to twenty years and a fine. Any proportionality review must be of this sentence alone and not in combination with other sentences.

Under Virginia law applicable at the time of Respondent's

trial the legislature had made it a serious felony to sell for profit any drugs classified as a Schedule I, II or III drug. *See* § 18.2-248. The legislature set the range of punishment for a violation of this law from five to forty years. In fact the Respondent received exactly one-half of the authorized punishment. Considering parole, which the Fourth Circuit declined to do, the Respondent would be eligible for parole in less than five years. It simply cannot be said that such a sentence is cruel and unusual when the jury knew the Respondent to be a drug dealer by vocation, that he was willing to sell drugs to be taken into a penal institution, and had probably sold drugs to the inmate's wife who had been left alone with an infant child. The trial judge who could have reduced this sentence, in addition to knowing what the jury knew, also knew that Respondent had previously been convicted of selling L.S.D. and was free on bail pending appeal when he commited the present offense.

The legislative purpose in enacting § 18.2-248 was to interdict and punish those persons who would sell controlled drugs for a profit. The legislature had recognized that if a person distributed marijuana only as an accommodation to another individual and not with intent to profit or to induce the recipient to use or become addicted to or dependant upon marijuana then his punishment would be a Class I misdemeanor. The maximum punishment for a Class I misdemeanor under Virginia law is twelve months in jail. § 18.2-11. Further the legislature made a determination that persons convicted solely of possession of marijuana the punishment again would be a Class I misdemeanor. § 18.2-250.

The legislative determination that the range of punishment for persons who sell controlled drugs for profit would be from five to forty years allows the sentencing authority to allocate an appropriate sentence by taking into considera-

tion the background of the defendant, and the nature of the crime. Selling drugs to be taken into a penal institution is certainly more serious than selling the same amount of drugs on the streets.

The Respondent's second conviction was for possession of marijuana with intent to sell. When the police went to Respondent's home they not only found eight grams of marijuana in a jacket, but also found one-hundred and sixty-eight grams of marijuana in a bag outside of the bedroom window. In addition the police found two sets of scales and other drug paraphernalia, the tools of the trade of a drug dealer. Again, this sentence must be viewed alone in any proportionality review.

The jury knew that Respondent was an active drug dealer and that the drugs found were not for his own use. The trial judge knew that Respondent had not been detered by his previous conviction and was continuing to pursue his trade while on bond from another drug conviction. *See Carmona* v. *Ward,* 576 F.2d at 406. Such conduct by Respondent would of necessity be viewed as constituting a serious offense by the jury, and they imposed a sentence which was half of the authorized punishment.

The Respondent did not attack the validity of § 18.2-248 on its face and thereby has accepted the legislature's classification of the sale of marijuana for profit as a serious offense. It cannot be said that Respondent's sentence of twenty years is without a rational basis or that it is such as would shock human sensibilities.

CONCLUSION

This case raises serious questions of federal law which go to the very heart of our democratic society. To venture into the thicket of proportionality review of sentences for a term

of years should not be taken lightly or without guidance from this Court.

For the foregoing reasons, certiorari should be granted, and the judgment of the Court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, of counsel for the petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify on the 19th day of September, 1979, I mailed a copy of the foregoing Petition for Writ of Certiorari to Edward L. Hogshire, Esquire, 500 Citizens Commonwealth Center, Post Office Box 1151, Charlottesville, Virginia 22902, and to John C. Lowe, Esquire, 409 Park Street, Charlottesville, Virginia 22903, counsel for respondent.

JAMES E. KULP
Deputy Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1782

ROGER TRENTON DAVIS,

Appellee,

versus

JACK F. DAVIS, Director,
Virginia State Department of Corrections,
and
R. M. MUNCY, Superintendent,
Powhatan Correctional Center,

Appellants.

Decided June 29, 1979

PER CURIAM:

The petitioner was prosecuted in a court of the Commonwealth of Virginia upon charges of possession of marijuana with the intent to distribute and its distribution. Upon conviction, although less than nine ounces of marijuana were involved in the offenses, the court imposed a fine of $20,000 and a sentence of imprisonment of forty years. The district court concluded that the penalties imposed were so disproportionate to the offenses as to amount to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States. On that basis, a writ of habeas corpus was awarded, and the Commonwealth of Virginia has appealed.

We affirm for reasons sufficiently stated by the district judge in his opinion. 432 F. Supp. 444 (W.D. Va. 1977).

This action supersedes the panel opinion. 585 F.2d 1226 (4th Cir. 1978).

AFFIRMED.

WIDENER, Circuit Judge, dissenting, in which dissent he is joined by Judge Russell and Hall.

I respectfully dissent for the reasons expressed in the opinion of the panel. 585 F2d 1226 (4th Cir. 1978).

In addition, I should note that I think both the district court and this court have usurped not only the function of a State legislature but also that of a State court and a State jury.

This is the first time, to my knowledge, in the history of Article III courts, that a federal court of appeals[1] has, without invalidating a statute, set aside the sentence of a State court imposing punishment for a term of years plus a fine, within State statutory limitations, as being cruel and unusual, and the error is compounded because the sentence itself, while imposed by the court, was fixed by a jury.

The majority opinion emphasizes, apparently as a principal reason for its decision, that less than nine ounces of marijuana were involved in the drug sale in question (for that is the only reason it gives aside from referring to the opinion of the district court). But, at the same time, it does not mention most relevant facts which were before the State court.[2] Davis was a previously convicted seller of drugs

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[1] *Downey* v. *Perini,* 518 F2d 1288 (6th Cir. 1975), set aside an indeterminate sentence for possession and sale of marijuana under Ohio law. Because the court held the minimum sentence invalid, I would construe the opinion as invalidating the statute.

It is acknowledged that the Supreme Court has never taken such action.

[2] The district court also chose largely to disregard these facts in its opinion, for it mentioned few of them. Its continued emphasis was on "less than nine ounces."

(LSD),[3] and known drug dealer, who, when apprehended, was in possession of the typical paraphernalia of his vocation. He had sold drugs to the young wife of a prison inmate, who had a baby at home, which is what brought about the instant conviction. The marijuana sold here was being sent with Davis' knowledge into a State prison camp for use by the inmates, as was LSD and another illegal drug which were turned over by Davis for that purpose, at the time of the marijuana purchase, to the purchaser of the marijuana involved in this case.

While I would deny the authority of a federal court to inquire into the amount of Davis' punishment, rather requiring him to attack the statute involved,[4] on the facts of the case at hand, I think it cannot be said that Davis did not merit the punishment awarded, so that as a matter of fact as well as a matter of law his punishment was neither cruel nor unusual within the meaning of the Eighth Amendment.

I think the precedent we set here, setting ourselves up as a super State jury, is not only without legal precedent or authority, in the setting of our "charter of government" I think it is fraught with danger.

[3] The district court in its opinion points out yet another conviction of Davis, prior to Davis' sentence here, for feloniously distributing marijuana. 432 F.Supp. at 448, n. 1. This marijuana conviction was only *one day* before the search which netted the authorities the 168 grams involved here.

[4] The en banc court could have taken this view upon respectable precedent as pointed out in the panel opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1782

ROGER TRENTON DAVIS

Appellee,

v.

JACK F. DAVIS, Director,
Virginia State Department of Corrections,
and
R. M. MUNCY, Superintendent,
Powhatan Correctional Center

Appellants.

Decided October 30, 1978.

WIDENER, Circuit Judge:

This is an appeal from the issuance of a write of habeas corpus in which case the district court set aside two sentences as being so disproportionately excessive as to constitute cruel and unusual punishment under the Eighth Amendment.

Roger Trenton Davis was convicted in a trial by jury in Wythe County, Virginia of the offenses of distribution of marijuana and possession of marijuana with intent to distribute. In his petition for a writ of habeas corpus, Davis attacked the severity of the sentences he received, as well as making other constitutional claims.[1] He contends that in this

[1] Davis made several additional constitutional claims which were dismissed by the district court. He does not appeal from their dismissal, and the issues are not before this court. The district court's opinion is reported at 432 F.Supp. 444 (W.D. Va. 1977).

appeal the offense committed was minor; the facts constituting the case against him reveal a relatively insignificant crime for which the Commonwealth's sanction should be correspondingly slight; and, in view of the claimed relative innocuousness of the act of selling marijuana in the amounts proven, the sentences imposed were disproportionate to the offense. While the district court granted the writ, we do not agree and we reverse.

I

Davis was sentenced to two twenty year terms, to be served consecutively, and fined $10,000 for each of the two counts. As is the practice in Virginia, the jury sentenced Davis upon its finding of guilt, and the court entered judgment on that verdict. *Va. Code Ann.*, § 19.2-295.[2]

The jury awarded the sentence after hearing evidence which revealed Davis to be a dealer in drugs who sold them to a man who had informed Davis that the drugs were being procured for distribution to inmates in a state penal institution. Davis sold not only marijuana but also two other drugs in pill form, all to be taken to the inmates.

The evidence against Davis centered principally in the testimony of Danny Ray Eads. Eads, an inmate at Bland prison farm, approached prison officials with a proposition concerning drug traffic in Pulaski and Wythe Counties. Eads was concerned by his wife's use of drugs (she had become a drug user after his confinement) and the consequent effect on the welfare of his two year old child; he told authorities that he desired a furlough from prison in order to assist in the exposure and arrest of those supplying drugs to his wife and any illicit drug distributor in the area, including Davis who Eads identified as an active drug dealer in Wythe County.

[2] See *Vines* v. *Muncy*, 553 F2d 342 (4th Cir. 1977).

The Commonwealth accepted Ead's offer of assistance and allowed him a furlough for the purpose of apprehending drug traffickers in Pulaski and Wythe Counties. During the time of the investigation, Eads was under strict surveillance. As part of the investigation, for example, he wore a transmitter strapped to his body so that the police could hear and record his conversations with drug dealers.

Eads met Davis on the streets of Wytheville in front of a "head shop," a store specializing in the sale of drug paraphernalia. Eads testified that he and Davis had become acquainted in jail while Davis was in jail, having been arrested on a different drug offense. He told Davis that he wished to purchase some drugs for himself and for some mutual friends at Bland prison farm. Davis responded that he thought he could provide Eads with the contraband he needed, left, and returned ten minutes later. Eads then accompanied Davis to the latter's home.

There, the two men went into Davis' bedroom. Davis removed a portion of marijuana from a large plastic bag, weighed it on a small scale, and gave three ounces of marijuana to Eads in return for $74.00. Also, at that time, Davis gave Eads the drug pills which included L.S.D. and another illicit controlled drug. This conversation between Eads and Davis was transmitted via Ead's hidden transmitter and recorded by the police. That recording, as well as the recording, of Ead's initial contact with Davis, was played to the jury. Thus, the jury was intimately familiar with the conversation accompanying the transaction, including the participants' recognition that the purpose of the drug acquisition was for distribution to inmates in one of the Commonwealth's penal institutions, as well as Davis' gratuitous statement that he would like to blow up the state police headquarters in Wytheville.

On October 26, 1973, law enforcement officials raided

the Davis residence. In Davis' bedroom they discovered two sets of scales and other drug paraphernalia. A small plastic bag containing 8 grams of marijuana was found in a jacket. About fifteen feet outside of the bedroom window, officers discovered a large plastic bag, similar to the receptacle from which Davis drew the marijuana sold to Eads, containing 168 grams of marijuana. Davis was discovered hiding in a closet and told the officers they could not search anything except his room.

Faced with this evidence, the Wythe County jury was obviously impressed by Davis' complete involvement in the business of selling drugs. While not given all the details, the jury knew from Eads' testimony that this was not Davis' first trouble with the law in a drug related offense. The evidence clearly allowed the jury to see the petitioner as an active drug dealer and not new at the business. He was, instead, an individual fully aware of the nature of his illegal activity, who, aware of the purpose for which the drugs were being procured, was in the business of selling drugs for profit. Accordingly, the jury awarded the petitioner a sentence which it believed was appropriate for such an offender. The trial court, with a more detailed comprehension of Davis' record of prior drug offenses, chose to enter judgment on that verdict, and directed the sentences to be served consecutively. A reasoned decision on whether the sentences were cruel and unusual must do more than to take these facts into account; it must accept the facts as an indication of the nature of the crime committed.[3]

[3] Davis does not contend that the sentences authorized by the Virginia statute are on their face cruel and unusual. Rather, he points to the excessiveness, in his particular case, of the sentence awarded by the jury and imposed by the court, relying on *Hart* v. *Coiner,* 483 F2d 136 (4th Cir. 1973), cert. den., 415 U.S. 938 (1974). Hence, we should examine the nature of the factual case against Davis, and, as in any other criminal case, draw all inferences in favor of the

II

A.

In the petition for a writ of habeas corpus and in argument, Davis has contended that the sentences imposed upon him are so excessive as to be disproportionate to the crime he commited. Although we recognize that the Eighth Amendment "proscribes punishment grossly disproportionate to the severity of the crime," see *Ingraham* v. *Wright,* 430 US 651, 667 (1977), Davis' argument would require us to find cruel and unusual a sentence for a term of years and a fine, both of which are within the limits set by statute. Under Virginia law, the distribution of controlled substance, such as marijuana, and the possession of the same for distribution were punishable by a term of imprisonment not less than five nor more than forty years and by a fine of no more than $25,000. *Va. Code Ann.*, 1974 Repl. Vol., § 54-524.101:1; see *Va. Code Ann.* § 18.2-248. Davis was sentenced to twenty years imprisonment and a $10,000 fine for each count, punishment well within the limits imposed by the statute. Hence, we are faced with the question of what is the proper inquiry into the severity of a jury-awarded and court imposed sentence, when the challenged punishment is a term of years and fine which fall within the limits imposed by statute?

B.

We begin our inquiry with the observation that the Su-

Commonwealth, for we inquire, in a habeas corpus proceeding, only as to whether there was any evidence at all to support the judgment of the State court. *Williams* v. *Peyton,* 414 F2d 776 (4th Cir. 1969).

[4] If the distribution, or the possession for distribution, of the marijuana had not been for profit, or to induce the use thereof or addiction thereto, but merely as an accomodation to another individual, Davis would only have been guilty of a Class 1 misdemeanor. § 54-524.101:1. A Class 1 misdemeanor is punishable by confinement in jail not to exceed twelve months, or a one thousand dollar fine, or both. *Va. Code Ann.* § 18.2-11.

preme Court has never found a sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment under the Eighth Amendment. *Downey* v. *Perini,* 518 F2d 1288, 1290 (6th Cir. 1975), vacated for reconsideration in the light of an Ohio statute 423 US 993 (1975).[5]

The Supreme Court decisions upon which Davis places primary reliance clearly is not such a case. *Weems* v. *United States,* 217 US 349 (1910) involved more a question of the method of punishment than the length of the prison term. The defendant, an official of the Phillipine government, was convicted of falsifying public records and sentenced to fifteen years imprisonment, *cardena temporal.*

The presence of the sanction *cardena temporal* prevents the *Weems* opinion from stating a holding on a challenge to the mere length of a prison sentence; it indicates that the decision deals with the conditions accompanying the service of the sentence and the disabilities which followed the convict even after release from confinement.

Cardena temporal was an hispanic sanction, carried over into Fillipino law from the jurisdiction's Spanish antecedents. The punishment involved a sentence of from twelve to twenty years imprisonment, at "hard and painful labor" with "a chain at the ankle, hanging from the wrists." *Id.,* at p. 364. Moreover, the imposition of *cardena temporal* stripped the convict of "the right of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos* . . ." (civil interdiction); it placed him under surveillance by the state for the remainder of his life, including getting permission even to change residence, and it stripped him of the right to hold public office, to vote, or to receive honors or retirement pay. *Id.,* 364-365.

[5] In *Howard* v. *Fleming,* 191 US 126 (1903), the Court, considering only the length of the sentence, held that a ten year sentence for swindling by means of a pretended gold brick was not cruel and unusual.

Thus, the sentence imposed upon Weems constituted more than a prison sentence and a fine. Rather, as the Court observed, after the "prison bar and chains [were] removed," Weems would go, not to freedom, but to "a perpetual limitation of his liberty." *Id.,* at p. 366. The deprivations incidental to the imposition of *cardena temporal* colored the sanction and required the invalidation of the sentence imposed on Weems. The loss of political rights, the subjection of the convict to perpetual state surveillance, and the terrible incidents of the prison term, including the painful labor in chains and shackles, shocked the Court into the decision it made. Clearly, the incidents of *cardena temporal,* and not the mere length of a fifteen year prison term for an unfaithful public servant, prompted the Court to the decision it reached.

This conclusion is buttressed by the later portion of the Court's opinion in *Weems* wherein the Court confronts a plea by the United States to sever the prison term from the incidents of *cardena temporal,* leaving the former in force while voiding the latter. The Court's response was plain and to the point: the incarceration was inseparable, under Phillipine law, from the incidents of *cardena temporal, Id.,* at p. 382, the imposition of *cardena temporal* was required by that law, *Id.,* at p. 381; and *cardena temporal* was in violation of the Eighth Amendment, *Id.,* at p. 382. Therefore, the decision rests, not on the length of the prison sentence, but on the incidents of its service and consequential and lifelong restrictions on liberty which followed the prisoner's release from prison.

Davis has also placed reliance on *Robinson* v. *California,*

370 US 660 (1962) in arguing that the Supreme Court has spoken on the issue of whether a sentence, by its length alone, may be cruel and unusual. That reliance is misplaced. *Robinson* involved the application of the Eighth Amendment to "impose substantive limits on what can be made criminal and punished as such." *Ingraham* v. *Wright,* 430 US 651, 667 (1977). The Court merely held that the Constitution forbade the incarceration of a narcotics addict as a criminal. Thus, the decision related to the criminality of the status of an offender, forbidding the use of criminal sanctions against such individuals, regardless of the severity or leniency of the sentenec. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson, supra,* 370 US at p. 667.

C.

Even though the court has never held an otherwise lawful sentence for a term of years to be cruel and unusual, Davis correctly indicates that there is discussion in some of the cases which sets out a doctrine under which a sentence may be set aside as cruel and unusual if it is "grossly disproportionate to the severity of the crime." See *Ingraham* v. *Wright,* 430 US 651, 667 (1977).

Davis has not attacked the validity of the statute imposing the sentence for his crime; he has instead claimed that, in his particular case, the sentences imposed upon him were cruel and unusual even though they were within statutory limits. While some circuits rule that an attack on a sentence with statutory limits will be considered an attack on the sentencing statute, see e.g., *Pependrea* v. *United* States, 275 F2d 325 (9th Cir. 1960), cf. *Weems,* p. 382, this circuit apparently allows a convict to present a claim in the manner by which Davis has proceeded, i.e. whether the "sentence *in this case* is so excessive and disproportionate

to the underlying offenses as to constitute cruel and unusual punishment." (italics in original) *Hart* v. *Coiner,* 483 F2d 136, 139 (4th Cir. 1973), cert. den. 415 US 938 (1974).

Davis' contentions as well as the district court's opinion are based upon an implementation of the analysis followed in *Hart* v. *Coiner*. However, the circumstances here, especially the imposition of sentences consisting of terms of years within the periods authorized by statute, make reliance on the *Hart* analysis misplaced.

The district court borrowed from *Hart* the guidelines which were used in that decision to determine the constitutionality of the sentence imposed. The guidelines included the nature of the offense committed, the legislative purpose behind the punishment, the punishment imposed in other jurisdictions for the same offense, and the punishment imposed in the same jurisdiction for other offenses. While these factors may be proper to consider in certain cases under the Eighth Amendment, we do not believe that *Hart* meant them to be mandatory or all inclusive in each such case. Cases contemporaneous with, before, and after *Hart* make that apparent.

To begin with, we should note that, like the Supreme Court, we have never set aside a sentence for a term of years, as in violation of the Eighth Amendment, because of excessive length. In *Ralph* v. *Warden,* 438 F2d 786 (4th Cir. 1970) we set aside a death sentence for rape in which the victim's life was neither taken nor endangered because the sentence was "so disproportionate," p. 793; in *Hart* v. *Coiner* we disapproved imprisonment for life for recidivism for conviction of three felonies[6] because the sentence was "so excessive and disproportionate to the underlying

[6] Passing a $50.00 check with insufficient funds, transporting forged checks in the amount of $140.00 across the state lines, and perjury. See *Hart,* p. 138.

offenses," p. 139; and in *Roberts* v. *Collins,* 544 F2d 168 (4th Cir. 1976) we set aside five years of a twenty year sentence for assault, because assault (with no maximum sentence) was a lesser included offense of assault with intent to murder. Following a guilty plea to assault as a lesser included offense of one crime charged,[7] we held "...the Constitution does not sanction the imposition of a greater punishment for a lesser included offense than lawfully may be imposed for the greater offense," p. 170. Other than these three cases, no case is called to our attention in which we have awarded relief to a prisoner under the Eighth Amendment for relief from a sentence within the bounds of a statute. None of them nullify a sentence of a term of years because of length, and none modify or limit the cases we analyze below which were decided under the Eighth Amendment.

In *United States* v. *Martell,* 335 F2d 764 (4th Cir. 1964) we held, in denying relief from a forty year sentence for kidnapping, that "[w]here the sentence is within the limit set by the statute, we are barred, except in the most exceptional circumstances, from any inquiry we might otherwise be inclined to make," p. 766. In *Stevens* v. *Warden,* etc., 382 F2d 429 (4th Cir. 1967), although we termed a twenty year sentence for armed robbery "shocking" because of the circumstances of the case, we held "...the federal courts have no right to review any sentence of a state court which does not exceed the statutory maximum sentence which may be imposed under the laws of the state," p. 433. In *Robinson* v. *Warden, etc.,* 455 F2d 1172 (4th Cir. 1972) we held that a fifteen year sentence for assault with intent to commit murder was not cruel and unusual because "[t]he 15-year

[7] Roberts was charged both with assault and assault with intent to murder. The maximum sentence for assault with intent to murder was 15 years.

sentence was within the range of punishment allowed by Maryland law, and the sentence was not disproportionate to the crime," p. 1177.

Hart previously mentioned, followed in 1973, accompanied by its companion case decided the same day, *Wood* v. *South Carolina,* 483 F2d 149 (4th Cir. 1973), which denied relief from concurrent five year sentences for making obscene telephone calls. While we discribed the statutory maximum of ten years as "startling," having been increased from six months, we held the sentences were not "so excessive and disproportionate as to constitute cruel and unusual punishment," p. 150. We noted that there were no objective factors establishing disproportionately, and referred to *Hart,* but did not follow the analysis of that case.

After *Hart* and *Wood,* in other Eighth Amendment cases we have followed the pattern of *Martell, Stevens,* and *Robinson.*

In *United States* v. *Wooten,* 503 F2d 65 (4th Cir. 1974), citing *Martell,* but not *Ralph* or *Hart,* we affirmed a two year maximum sentence for a gun law conviction because "[i]t has been decided by this court that interference with a sentence which is within the limitation provided by statute is not, in the absence of extraordinary and special circumstances, within the appellate court's province," p. 67. In *United States* v. *Atkinson,* 513 F2d 38 (4th Cir. 1975) we affirmed sentences of twelve and four years for young adult offenders without the *Hart* analysis.

Yet other cases have distinguished *Hart.* In *Griffin* v. *Warden, etc.* 517 F2d 756 (4th Cir. 1975) we denied relief following conviction unde rthe same West Virginia recidivist statute at issue in *Hart.* Our only distinction was that the convictions of felony by Griffin (burglary, breaking and entering, and grand larceny) "are not at all like those of Hart," p. 757, but "involve the potentiality of violence and

danger to life as well as property," p. 757. We then said: "Whether or not Griffin may be actually deserving of such extreme punishment is not within our province to decide; we hold only that the imposition of a life sentence predicated upon these particular three offenses does not offend the eighth amendment," p. 757. The court did not engage in any further distinction of Hart except its comparison of the offenses upon which the convictions were based. In *Hall* v. *McKenzie*, 537 F2d 1232 (4th Cir. 1976) we denied habeas corpus relief on account of a 10-20 year sentence for non-forcible rape of a minor. We held that *Hart* had no application because of a "number of factors."[8] p. 1235. The first factor listed was the severity of the sentence, referring to the difference between life and 10-20 years. The case also pointed out that its measuring up to one of the *Hart* guidelines was questionable (the sentence allowable in other states), and that this crime was against the person. We held Hart not determinative and said "[a] more apt precedent is *Wood*," p. 1236, which was decided without the *Hart* analysis as we have noted.

In view of circuit precedent, we are of opinion that the scope of inquiry into the constitutionality of a legal sentence for a term of years need not be as broad as the inquiry used in *Hart* when a life sentence was imposed. In an attack for excessiveness on a sentence for a number of years, any authorized inquiry of the court should extend only to the consideration of the seriousness of the offense committed and the application of the sanction imposed for that offense. We can give no relief unless the sentence imposed is "grossly disproportionate to the severity of the crime." *Ingraham* v. *Wright*, 430 US 651, 667 (1977). And in those cases where

[8] *Ralph* was held to have no application because it involved the death penalty "which occupies a special place in eighth amendment jurisprudence."

the challenged sentence is fixed by a jury within the limits imposed by statute, we afford special deference to the legislative and jury determination of the seriousness of the offense, and whether the punishment is cruel and unusual. See *Gregg* v. *Georgia*, 428 US 153, 174-184 (1976). Thus, the sentence will not be considered grossly disproportionate to the severity of the offense unless there are "extraordinary and special circumstances" which make an otherwise valid sentence cruel and unusual. *United States* v. *Wooten*, 503 F2d 65, 67 (4th Cir. 1974).

This rule antedates the *Hart* opinion and, as we have shown is unaffected by *Hart*. Nor is the rule peculiar to this circuit, it seems to be generally accepted by various courts of appeal. See *United States* v. *Dawson*, 400 F2d 194 (2d Cir. 1968) cert. den. 393 US 1023 (1969); *Page* v. *United States*, 462 F2d 932 (3d Cir. 1972); *Yeager* v. *Estelle*, 489 F2d 276 (5th Cir. 1973), cert. den. 416 US 908 (1974); *United States ex rel. Sluder* v. *Brantley*, 454 F2d 1266 (7th. Cir. 1972); *United States* v. *Wilson*, 506 F2d 521 (9th Cir. 1974); *United States* v. *MacClain*, 501 F2d 1006 (10th Cir. 1974). Contra: *Downey* v. *Perini, supra*. In fact, as we have noted, some circuits are more strict than are we, refusing to allow the convict to argue that the sentence imposed was cruel and unusual in his particular case, considering such a claim an attack the sentencing statute itself. See also *Dawson*, p. 200.

Therefore, assuming we have any power to review the sentence, cf. *Stevens*, p. 433, we arrive at the same conclusion reached by the Fifth Circuit that a sentence for a term which is within the limits set out by statute will not be considered cruel and unusual unless it is so disproportionate as to "shock [. . .] human sensibilities." *Yeager* v. *Estelle*, 489 F2d 276 (5th Cir. 1973), cert. den. 416 US 908 (1974). And, even in such cases, judicial inquiry also may only

inquire whether there are extraordinary and special circumstances which taint what would otherwise be a perfectly legal sentence.

Examining this case for extraordinary and special circumstances which would indicate that the sentences given Davis were constitutionally disproportionate to the offenses he committed, we find no indication of such disparity as to shock human sensibilities, if any disparity at all. The evidence shows the defendant to be a drug dealer by vocation who was willing to sell illegal narcotics to inmates of a penal institution, and probably as well to the wife of an inmate left alone with an infant child. The jury therefore had the right to consider the offense a very serious crime. By not attacking the sentencing statute on its face, Davis has accepted the legislature's classification of the sale of marijuana as a serious offense; he must prove that, in his particular case, the offense was not serious or was mitigated in some way which necessarily precluded the imposition of the sentence awarded. But recordings of the transaction between Eads and Davis were played to the jury, as well as other damning evidence admitted. The jury was familiar with the nature of the transaction as well as the defendant's drug selling business. We cannot say that the jury could not have been impressed by what it heard, and it has a right to consider all the evidence in fixing the sentences.

Finally, the trial judge, who could have sentenced concurrently, sentenced consecutively. Not only had he heard the witnesses testify, which we have not; he knew, for example, which the jury did not, that Davis previously had been convicted of selling LSD and that the two offenses for which Davis had just been found guilty were committed while on bail pending appeal from the previous conviction for selling LSD.

Thus, we are unable to say that there is no evidence at all,

Williams v. *Peyton*, 414 F2d 776 (4th Cir. 1969), to support the conclusion by the jury and trial court that Davis committed serious crimes which might deserve the punishment awarded. Finding no extraordinary and special circumstances, and being of opinion that the sentences do not shock human sensibilities, we conclude that the sentences imposed on Davis were neither cruel nor unusual.

Accordingly, the judgment of the district court is

REVERSED.